that all the relevant matters are placed before the Magistrate and he can duly authorize, and the executing officer be fully aware of, the extent of the available powers.

2. The applicant should place before the Magistrate an information upon oath and a warrant in writing. The information ought properly to be in the form of a deposition stating shortly the facts, rather than a purely formal document in technical language: *Herniman* v. *Smith.*[17]

3. The application is made *ex parte* and the decision whether or not to issue a warrant is a matter for the Magistrate's discretion. The Magistrate has a duty to satisfy himself in all the circumstances that it is right to issue a warrant. He may question the person swearing the information to this end, and although a police officer who applies for the warrant should not be expected to identify his informant, the Magistrate may wish to know what checks have been made on the reliability of his information. If satisfied, the Magistrate will sign the warrant. The information should be taken to the Court office as soon as possible.

4. No action will lie against the person, applying for a search warrant, who acts *bona fide* and without malice, with reasonable cause, and who fully and fairly states his grounds thus resulting in the issue of a warrant (*Hope* v. *Evered,*[18] *Utting* v. *Berney,*[19] *Lea* v. *Charrington*[20]).

5. The warrant may be executed by any person to whom it is directed. The officer must have the warrant in his personal possession at the time of the search to produce it if required (*Galliard* v. *Laxton,*[21] *Codd* v. *Cable.*[22]

In the result, I quashed the order made by the issuing Magistrate directing that the unscheduled articles be returned to the owners through the police and substituted in its place an order that the police authorities be authorised to retain custody and control thereof to facilitate investigations into possible offences in contravention of section 15(1).

Similarly, I varied the order made by the issuing Magistrate as regards the scheduled articles so as to enable the police authorities to continue to retain custody and control thereof, to facilitate investigations into possible offences in contravention of section 15(1).

Finally, I reminded the police authorities of their statutory obligations under section 15(4)(b), namely, that if no proceedings under section 15(1) were instituted within six months of the seizure of the scheduled and/or unscheduled articles, as the case may be, the same shall be returned to the person or persons in whose possession they were when they were seized, or if it was not reasonably practicable to return them to those persons, they should be disposed of in accordance with the law relating to the disposal of lost and unclaimed property.

Order accordingly.

Solicitors: *Asbir, Hira Singh & Co.*

TAN SUAN HEOH v. LIM TECK MING & ORS.

[O.C.J. (Edgar Joseph Jr.J.) August 30, 1985]

[Penang – Originating Motion No. 17 of 1985]

Land Law – Written form for sale and purchase of land – Non-signing of agreement of sale and purchase – Part payment of deposit – Forfeitable if balance of deposit not paid by certain date – Completion date provided – Assignment of rights by purchaser to sub-purchasers – Refusal to complete sale by proprietor – Caveat by sub-purchasers – Whether it should be removed – National Land Code, s. 327(1).

The applicant is the registered proprietor of land comprised in holding No. 1241, section 1, Bandar Tanjong, Penang ("the property"). By a form in writing dated April 16, 1985, addressed to Lee Wah Housing Agency, and signed by one Lim Hor Heang and the applicant, it was provided therein that Lim Hor Heang had paid a part deposit of $2,000 for the purchase of the property for a consideration of $93,000 and that payment of the balance of the deposit of $11,950 was to be made on the signing of the agreement of sale and purchase on or before April 30, 1985, failing which the said sum of $2,000 would be forfeited. The sale was to be completed on or before July 31, 1985. For valuable consideration, Lim Hor Heang purported to assign to the first and second respondents all her rights to purchase the property. On the same day they by their solicitors' letter dated April 26, 1985, gave notice of the assignment to the Housing Agency. The applicant through her solicitors' letter dated May 6, 1985, replied to the solicitors for the first and second respondents, stating that she did not wish to sell the property to them and that she did not accept the purported assignment. The first and second respondents then lodged a caveat against the property. The proprietor applied for its removal, contending that the signing of the agreement of sale and purchase was a condition precedent and that there was no serious question to be tried. Alternatively, the purported assignment or notice was not valid.

Held: (1) the first and second respondents had discharged the onus which lay upon them as caveators;

(2) in order to preserve the *status quo* and in the exercise of his discretion, the learned Judge ordered that the caveat should be removed, unless proceedings against the applicant for specific performance were commenced within one month from date of determination of the application.

[*Editorial Note:* The applicant's appeal to the Supreme Court (Salleh Abas L.P. Mohamed Azmi & Abdoolcader S.C.JJ.) was dismissed on May 26, 1986.]

Cases referred to:

(1) *Von Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284.
(2) *Masters* v. *Cameron* (1954) 91 C.L.R. 353, 362.
(3) *Love & Stewart Ltd.* v. *Instone (S) & Co.* (1917) 33 T.L.R. 475 (H.L.).
(4) *Niesman* v. *Collingridge* (1921) 29 C.L.R. 177.
(5) *Signal* v. *Kay-Stratton* [1955] N.Z.L.R. 1025.
(6) *Oxford* v. *Provand* (1868) L.R. 2 P.C. 135.
(7) *Branca* v. *Cobarro* [1947] 1 K.B. 854.
(8) *Bransom* v. *Stannard* (1879) 41 L.T. 434.
(9) *Alpenstow Ltd. & Anor.* v. *Regalian Properties* [1985] 1 W.L.R. 721.
(10) *Bahamas International Trust Co. Ltd.* v. *Threadgold* [1974] 3 All E.R. 881, 884 (H.L.).
(11) *Donaldson* v. *Donaldson* (1854) Kay. 711; 69 E.R. 303.
(12) *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (1886) 34 Ch. Div. 128.
(13) *Dearle* v. *Hall* (1828) 3 Russ. 1; 38 E.R. 475.
(14) *Meng Leong Development Pte. Ltd.* v. *Jip Hong Trading Co. Pte. Ltd.* [1985] 1 M.L.J. 7; [1985] 1 All E.R. 120.
(15) *National Provincial Bank* v. *Marshall* (1888) 40 Ch. Div. 112.
(16) *Eng Mee Yong* v. *Letchumanan* [1979] 2 M.L.J. 212.

ORIGINATING MOTION.

Tan Beng Hong for the applicant.

Miss Lim Hee Choo for the first and second respondents.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This was a registered proprietor's application under section 327(1) of the National Land Code, 1965, for removal of a caveat lodged by persons claiming to be sub-purchasers of land, comprised in holding No: 1241, section 1, Bandar Tanjung ("the property") by virtue of an assignment in writing dated April 26, 1985 made by the purchaser.

The essential facts, are concise and are neither complicated nor, for that matter, in dispute.

In her affidavit filed in support of her application by Notice of Motion, the applicant stated that one Lim Hor Heang, completed a form in writing dated April 16, 1985, being Ex. TSH 1 to Encl. 2 ("the form"), addressed to Lee Wah Housing Agency ("the Agent") for the purchase of the property for a consideration of $93,000 and, pursuant thereto, paid a sum of $2,000 to account of deposit.

The applicant further stated that payment of the purchase price was expressed to be conditional upon the signing of the Agreement of Sale and Purchase on or before April 30, 1985. This was an active misstatement of the facts for, nowhere in the form, was it so provided. On the contrary, it provided for (a) *payment* of the balance of the deposit of $11,950 on signing of the Agreement of Sale and Purchase on or before April 30, 1985, failing which the part deposit of $2,000, the receipt whereof was duly acknowledged, would be *forfeited;* (b) the sale to be *completed* on or before July 31, 1985. (Emphasis supplied).

I shall now reproduce the form for a better understanding of their true terms and effect. It provides:

LEE WAH HOUSING AGENCY
34, Green Lane Penang. (Opp. Siam Temple)
Tel: 884918 & 889766

Received from LIM HOR HEANG (I/C No: 0292141) of No. 9, KATZ STREET, PENANG. (hereinafter referred to as "The Purchaser") the sum of Dollars RINGGIT TWO THOUSAND ONLY – ($2,000) being part deposit for house No. 500 I, JALAN BUNGAH BAKAWAI, PENANG, erected on land known as LOT 1241 MK. 18 D.T.L. (hereinafter referred to as "The Said Property"). The Said Property is sold with vacant possession at the agreed purchase price of Dollars $93,000-00 (RINGGIT NINETY THREE THOUSAND ONLY – ($) only. The Purchaser agrees to pay a sum of Dollars RINGGIT ELEVEN THOUSAND NINE HUNDRED AND FIFTY ONLY – ($11,950-00) only on signing of the Agreement of Sale on or before the 30th day of APRIL 1985 failing which the part deposit of Dollars RINGGIT TWO THOUSAND ONLY ($2,000-00) shall be forfeited. The sale of the said Property is to be completed ON OR BEFORE 31/7/85 on signing of the Agreement of Sale.

date this 16 day of APRIL 1985.

I/We agree and confirm the above conditions.

Sgd: LIM HOR HEANG (I/C No. 0292141)
Sgd: TAN SUAN HEOH (I/C No. 3896347)

Sgd: TAN TATT SIN (I/C No. 4356925)

There is a further observation I wish to make. If, as alleged by the applicant, the signing of the Agreement of Sale and Purchase was a condition precedent to the creation of binding contractual relations between her and Lim Hor Heang, then, one would expect that in the event of non-compliance, the form would have provided for refund of the deposit of $2,000. However, it provided for nothing of the sort; on the contrary, there is an express stipulation entitling the applicant in the event of non-execution of the Sale and Purchase Agreement and non-payment of the sum of $11,950 on or before April 30, 1985, to forfeit the part deposit of $2,000. Indeed, the applicant by a letter dated May 6, 1985, being Ex. TSH 3 to Encl. 2, sent on her behalf by her solicitors, purported to exercise her right of forfeiture for breach of the stipulation.

It could thus be strongly argued that the right to forfeiture presupposes a binding agreement and not otherwise. In any event, such a right of forfeiture must surely be inconsistent with the contention that there was no binding agreement between the parties concerned.

I also note, in passing, that nowhere in the form was it stated that time was of the essence of the contract nor was it made so by notice. The importance of this will become apparent when I discuss the particular circumstances of this case.

But now I must go back a little and refer to the writing dated April 26, 1985, being Ex. A1 to Encl. 6, that is to say, four days before the expiry of period stipulated in the form for the signing of the Agreement of Sale and Purchase and payment of the sum of $11,950, whereby the said Lim Hor Heang in consideration of the receipt by her of a sum of $2,000, purported to assign to Lim Teck Ming and Tan Suan Sim, the first and second respondents, respectively, all her rights to purchase the property.

On the same day, notice of the purported assignment was given by the first and second respondents, through their solicitors, by letter dated April 26, 1985, being Ex. TSH2 to Encl. 2, addressed to the Agent. It was also pointed out therein, *inter alia,* that the first and second respondents were agreeable to purchasing the property on the terms and conditions stipulated in the form subject to the removal of a caveat lodged by one Goh Hau Choo and the title being free from encumbrances.

By letter dated May 6, 1985, being Ex. A4 to Encl. 6, the applicant, through her solicitors, replied to the solicitors for the first and second respondents, stating that she did not wish to sell the property to them and also that she did not accept the purported assignment.

This evoked a reply dated May 10, 1985, being Ex. A5 to Encl. 6, from the solicitors for the first and second respondents, asserting that the assignment was valid and that as the applicant was unable to fulfil her contractual obligations, she was liable to them for damages and costs in the sums of $4,000 and $500 respectively. It was further alleged that in the event of non-compliance, within seven days, legal proceedings for recovery would be commenced.

It was in these circumstances that the first and second respondents lodged the caveat, the subject of this application.

It was argued, in effect, that there was no serious question to be tried since, it was clear, that the form did not have any binding contractual force, for the conditions precedent stipulated therein, namely, the signing of the Sale and Purchase Agreement and payment of a sum of $11,950 to account of the purchase price on or before April 30, 1985, had not been fulfilled.

In the alternative, it was argued that the purported assignment was not valid and, in the further alternative, that the purported notice thereof suffered from the same defect.

I shall now touch on each of these objections in turn.

The question whether the form constitutes a binding agreement or merely an agreement to enter into an agreement is, in my view, not free from difficulty and raises serious questions to be tried as I shall now attempt to demonstrate.

An agreement may be so worded as to envisage that another document is to be entered into and signed by the parties. In such a case, it would be a question of interpretation, regard being had to all the circumstances, as to whether the parties have agreed upon all the terms of the contract and merely desire the agreement to be put into more formal language; or whether the execution of the further document is a condition precedent to the creation of contractual relations, so that the parties are still

in negotiation and further terms are yet to be decided upon or accepted. I shall deal with both of these possible situations in turn.

In the former case, the agreement is actually unconditional and a contract has been concluded so that the mere desire for a formal document may be disregarded. (*Von Hatzfeldt-Wildenburg* v. *Alexander*[1]; *Masters* v. *Cameron*[2]). More particularly, parties may legally make a contract containing terms, which the parties regard as essentials, and by which the parties are content to be immediately contractually bound, exclusively to any other terms, although at the same time they say that they will have a more formal document prepared; and anticipate that they will agree upon further terms, which will be inserted, by consent, in the new agreement (*Love & Stewart Ltd.* v. *Instone (S) & Co.*[3]). Be that as it may, the initial preliminary agreement is, nevertheless, a contract. It is not difficult to cite an anthology of cases in support of this proposition. My choice of cases where, in such circumstances, contracts were held to be concluded, is as follows: *Niesmann* v. *Collingridge*,[4] (option to purchase – part of price payable "on the signing of the contract"); *Signal* v. *Kay-Stratton*,[5] (letter offering to sell, and stating price and that deposit, of £250, to be paid on signing of contract-acceptance of deposit without requiring contract to be signed); *Oxford* v. *Provand*,[6] (agreement prepared by parties setting out terms, including term that both parties agreed that proper agreement should be drawn up by solicitor); *Branca* v. *Cobarro*,[7] ("this is a provisional agreement until a full legalised agreement drawn up by a solicitor); and *Bransom* v. *Stannard*,[8] (acceptance fixing time for signing formal contract). Even an agreement to sell land bearing the time honoured phrase "subject to contract" but setting out detailed provisions for contract and completion can constitute a binding contract: see *Alpenstow Ltd. & Anor.* v. *Regalian Properties*.[9]

I now turn to consider the latter case, that is, where the execution of the further document is a condition precedent to the creation of contractual relations and there is no contract; either because the condition has not yet been fulfilled, or because the law does not recognise a contract to make a contract as distinct from a contract to sign a written document containing the terms upon which the parties have already agreed: *Von Hatzfeldt-Wildenburg* v. *Alexander (supra)*.

The question, on which side of the line separating the two categories of agreement, as illustrated by the cases I have just cited, the instant case falls, can only be determined after detailed argument and mature consideration at the trial.

I might as well add that I did not regard the concession made by the solicitors for the first and second respondents in their letter dated April 26, 1985, being Ex. A3 to Encl. 6, addressed to the Agent, (but subsequently withdrawn during the argument) that there was no concluded contract until a formal Sale and Purchase Agreement was executed, as in any way binding on me. I am fortified in this conclusion by the following passage in the speech of Lord Wilberforce in *Bahamas International Trust Co. Ltd.* v. *Threadgold*[10]:

> "In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim for rectification, cannot be bound by any concession made by any of the parties as to what its language means. This is so even in the court before which the concession is made; a fortiori in the court to which an appeal ... is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the cases. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law if in his own opinion it was erroneous."

As to the legality of the assignment and of the notice thereof, I would regard these questions as clearly arguable. It is true that the consent of the applicant to the assignment was not obtained but nowhere in the form was there a prohibition against the assignment without such consent.

As to the contention that the notice of assignment was not accompanied by a copy of the assignment and so was bad in law, all I need to say about this technical point is that even if there were such a requirement (and I know of none), an equitable assignment made between assignor and assignee is complete and binding even if no notice is given: (*Donaldson* v. *Donaldson*[11]; *Gorringe* v. *Irwell India Rubber and Gutta Percha Works*[12]). However, if no notice is given, the assignee will be postponed to a subsequent assignment prior notice of which has been given (*Dearle* v. *Hall*[13]), provided that the subsequent assignee does not know of the prior assignment at the time when he takes the assignment.

The remaining points which arose on this application may be dealt with shortly.

I did not regard the letter dated May 6, 1985,

being Ex. A5 to Encl. 6, from the solicitors for the first and second respondents, addressed to the applicant's solicitors, wherein they claimed damages and costs amounting to $4,500 for breach of contract, as an election to relinquish or abandon the right (if any), to ask for specific performance. It was only a demand for damages which was not acceded to and, as a result, left the first and second respondents free to pursue the remedy for specific performance if they so wished. It would have been very different if the damages demanded had been paid and accepted. I am supported in that conclusion by the majority judgment of the Privy Council in *Meng Leong Development Pte.* v. *Jip Hong Trading Co. Pte.*[14] where the purchaser was estopped from seeking specific performance after seeking to enforce an order for damages by the trial Judge. The principle was repeatedly stated throughout the majority judgment. The following may be taken as an example:

"The vendor having been obliged by the purchaser to comply with the order to pay damages was vexed by another order for the specific performance.

The damages had been raised and paid and accepted. The purchaser was estopped by election from appealing against the order for the payment of those damages." (Emphasis supplied)

In the instant case, there was, as I have said, only a demand for damages and costs which had not been complied with.

Indeed, there is authority for saying that damages are not necessarily adequate even where the contract provides that liquidated damages shall be paid if it is broken (*National Provincial Bank* v. *Marshall.*[15])

This is not at all surprising for, as Lord Diplock said in *Eng Mee Yong* v. *Letchumanan*[16];

"In the case of a refusal by the vendor to complete a contract for the sale of land, the normal remedy of the purchaser as plaintiff in an action is an order for specific performance of the contract; and in the absence of specific performance, if it were shown that the vendor threatened to dispose of the land while the action was still pending, the balance of convenience would be in favour of granting an interlocutory injunction to prevent him doing so, provided that the plaintiff would be in a position to satisfy his undertaking as to damages if the action should fail at trial."

Again, the contention that the first respondent did not exercise her option to purchase as provided for in the form, namely, by paying the balance of the purchase price and signing an agreement of purchase on or before April 30, 1985, loses much of its sting when it is remembered, as I have already observed, that nowhere in the form was it provided that time was to be the essence of the contract nor was it made so by notice. It could thus be strongly argued that it was the applicant who had refused to complete the sale and who was thus herself in breach of contract.

At the end of the day, I reminded myself, of the fourteen words in section 327 of the National Land Code, namely, "the Court ... may make such order on the application as it may think just."

I next reminded myself of what Lord Diplock said in his advice in *Eng Mee Yong* v. *Letchumanan,* (at p. 215 col. 2B), when speaking about the nature of the onus that lies upon the caveator in an application by the caveatee under section 327 for removal of a caveat, namely:

"... he must first satisfy the Court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried, and having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party."

And, a little further down at the same page at paragraphs G & H his Lordship said this:

"once the caveator has met the first requirement of satisfying the Court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would, in the normal way, and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which alleges had been tried."

In the upshot, after stepping back and taking a second hard look at all the available material, I am thoroughly satisfied, for the reasons stated, that the first and the second respondents had discharged the onus aforesaid which lay upon them as caveators. However, I noted that they had not yet commenced proceedings against the applicant for specific performance. In these circumstances, in order to preserve the *status quo,* I exercised my discretion and ordered that the caveat should be removed, unless such proceedings were commenced within one month from date of determination of the application. I also made no order as to costs.

Order accordingly.

Solicitors: *Tan Beng Hong & Co.; Chew, Tan & Lim.*